

**POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON**

PUGET SOUNDKEEPER ALLIANCE,

and

NORTHWEST MARINE TRADE
ASSOCIATION,

Appellants,

v.

STATE OF WASHINGTON,
DEPARTMENT OF ECOLOGY,

Respondent.

PCHB NOS. 05-150, 05-151, 06-034,
& 06-040

(Consolidated)

**ORDER GRANTING AND DENYING
PARTIAL SUMMARY JUDGMENT**

On May 1, 2006, Respondent Northwest Marine Trade Association (NMTA) filed a Motion for Partial Summary Judgment through its attorney, James A. Tupper. The Department of Ecology (Ecology) filed its Response to the motion on May 16, 2006 through its attorney Joan M. Marchioro. Petitioner Puget Soundkeeper Alliance (Soundkeeper) filed its Response on May 16, 2006 through its attorney Richard A. Smith. NMTA filed a Reply on May 25, 2006. On May 1, 2006, Soundkeeper filed its Motion for (partial) Summary Judgment. Responses were filed by NMTA on May 15, 2006, and by Ecology on May 16, 2006. Soundkeeper filed a Reply on May 26, 2006. On June 6, 2006, the parties appeared through their above-named counsel and presented oral argument on both motions. NMTA FILED a Motion to Dismiss Issues 26, 29, 30, and 31 on June 29, 2006, and Soundkeeper filed a Motion to Dismiss Issues 15 and 22 on July 5, 2006. There has been no objection to either motion. In considering the motions for summary

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1 judgment, the Board considered the file and records herein, including the following motion
2 documents:

- 3 1. Northwest Marine Trade Association's Motion for Partial Summary Judgment;
- 4 2. Declaration of James A. Tupper, Jr., in Support of Northwest Marine Trade
5 Association's Motion for Partial Summary Judgment and Exhibits;
- 6 3. Declaration of Barry L. Kellems in Support of Northwest Marine Trade Association's
7 Motion for Partial Summary Judgment and Exhibits;
- 8 4. Ecology's Response to Northwest Marine Trade Association's Motion for Partial
9 Summary Judgment;
- 10 5. Puget Soundkeeper Alliance's Response in Opposition to Northwest Marine Trade
11 Association's Motion for Partial Summary Judgment and attached case decisions;
- 12 6. Declaration of Richard A. Smith, Supporting PSA Response to NMTA Motion for
13 Summary Judgment and exhibits;
- 14 7. Declaration of Sue Joerger;
- 15 8. Declaration of James Nichols;
- 16 9. Northwest Marine Trade Association's Reply in Support of its Motion for Partial
17 Summary Judgment;
- 18 10. Puget Soundkeeper Alliance's Motion for Summary Judgment;
- 19 11. Declaration of Richard R. Horner, Ph.D. and exhibits;
- 20 12. Deposition Transcript of Gary C. Bailey, February 23, 2006;
- 21 13. Deposition Transcript of Donna Ortiz DeAnaya, March 14, 2006;
14. Deposition Transcript of Marc Pacifico, March 16, 2006;
15. Deposition Transcript of Randall Marshall, March 16, 2006;
16. Deposition Transcript of John Drabek, March 22, 2006;
17. Deposition Transcript of Mark P. Hicks, March 22, 2006;
18. Deposition exhibits A through EE;
19. Northwest Marine Trade Association's Response in Opposition to Puget Soundkeeper
Alliance's Motion for Summary Judgment;
20. Declaration of James A. Tupper, Jr. in Support of Northwest Marine Trade
Association's Response in Opposition to Puget Soundkeeper Alliance's Motion for
Summary Judgment and exhibits;
21. Declaration of Barry L. Kellems in Support of Northwest Marine Trade Association's
Motion for Partial Summary Judgment and exhibits;
22. Department of Ecology's Response to Northwest Marine Trade Association's Motion
for Partial Summary Judgment;
23. Puget Soundkeeper Alliance's Response in Opposition to Northwest Marine Trade
Association's Motion for Partial Summary Judgment and attached case decisions;
24. Declaration of Richard A. Smith Supporting PSA's Response to NMTA's Motion for
Summary Judgment and exhibits;

1 25. Declaration of Sue Joerger;
2 26. Declaration of James Nichols; and
3 27. Northwest Marine Trade Association's Reply in Support of its Motion for Partial
Summary Judgment.

BACKGROUND

4 On November 2, 2005, Ecology issued National Pollutant Discharge Elimination System
5 (NPDES) General Permit No. WAG-03000, Boatyard General Permit (BGP) pursuant to its
6 authority under the Washington Water Pollution Control Law, Chapter 90.48 RCW and the
7 Federal Water Pollution Control Act (The Clean Water Act), Title 33 USC §1251 *et seq.* All
8 commercial boatyards engaged in the construction, repair, and maintenance of small vessels of
9 specified size in the State of Washington are required to obtain coverage under the BGP, unless
10 exempted, and to comply with all conditions specified in the BGP in their ongoing permitted
11 activities.

12 The typical boatyard activities that are covered under the BGP include pressure washing
13 hulls, painting and coating, engine and propulsion system repair and replacement, hull repair,
14 joinery, bilge cleaning, fuel and lubrication system repair and replacement, welding and grinding
15 of hull, buffing and waxing, marine sanitation device repair and replacement, and other activities
16 necessary to maintain a vessel. *Northwest Marine Trade Association's Motion for Partial*
17 *Summary Judgment, Ex. 1, Boatyard General Permit (BGP), p. 12.* All significant aspects and
18 conditions of the BGP relating to the protection of water quality are challenged in this case,
19 including the discharge limitations, the monitoring requirements, the standards used to measure
20 contaminants released, and the proper role of stormwater pollution prevention plans (SWPPP).

21 The Pre-Hearing Order in this case established 33 issues:

1. Did Ecology correctly apply the terms of WAC 173-201A-130?
2. Does the Board have jurisdiction over rule challenges?
3. Whether the Boatyard General Permit complies with applicable laws and regulations?
4. Does the permit unlawfully provide for the de facto modification of permit terms without adherence to permit modification procedures required by applicable law?
5. Does the permit unlawfully fail to ensure that authorized discharges do not cause or contribute to violations of water quality standards?
6. Does the permit unlawfully fail to include numeric effluent limitations for stormwater discharges of metals and other pollutants?
7. Does the permit unlawfully fail to include numeric effluent limitations for zinc for discharges to water bodies that are 303(d) listed for zinc?
8. Does the permit unlawfully fail to ensure that discharges do not cause or contribute to violations of water quality standards in 303(d) listed waters?
9. In developing the permit, did Ecology unlawfully fail to follow required procedures to determine the effect of regulated discharges on receiving water quality?
10. Does the permit unlawfully fail to require monitoring as mandated by applicable law?
11. Does the permit unlawfully fail to require monitoring necessary to determine whether discharges cause or contribute to violations of water quality standards?
12. Does the permit unlawfully fail to require sampling and analysis of stormwater discharges for zinc and lead?
13. Does the permit unlawfully fail to require sampling and analysis of receiving water hardness?
14. Is the permit's requirement to sample and analyze stormwater discharges only five times a year adequate to satisfy the requirements of applicable law?
15. Is the permit's failure to require sampling and analysis of stormwater discharges from all discharge points, or from discharge points determined to be representative of a permittee's discharge points, adequate to satisfy the requirements of applicable law?

16. Are the permit's provisions for responses to discharges above benchmark levels consistent with applicable law?
17. Are the benchmarks established by the permit consistent with applicable law?
18. Are the permit's requirements for certain activities to be "routinely undertaken" or performed "on a routine basis" impermissibly vague?
19. Is Ecology's failure to require submission of stormwater pollution prevention plans with applications for permit coverage unlawful?
20. Are the permit's requirements for record keeping and reporting consistent with applicable law?
21. Does the permit unlawfully fail to require a permittee to certify whether it is in compliance or non-compliance with permit conditions and to identify instances of non-compliance?
22. Is the permit unlawfully and unfairly internally inconsistent with respect to reporting of results of visual monitoring inspections?
23. Is the prohibition on the use of non-vacuum grinders in Special Condition S2.C.7 of the Boatyard General Permit, NPDES Permit No. WAG-030000 (Permit) reasonable and consistent with applicable laws and regulations?
24. Is the prohibition in Special Condition S2.C.7c on cleaning, repair, modification, surface preparation or coating of any portion of a hull while the vessel is afloat reasonable and consistent with applicable laws and regulations?
25. Is the requirement to use drop cloths in Special Condition S2.C.7.d reasonable and consistent with applicable laws and regulations?
26. Is Special Condition S.2.C.8 inconsistent with RCW 90.48.555(6) by failing to include a presumption of compliance with water quality standards?
27. Are the monitoring requirements in Special Condition S3 reasonable and consistent with applicable laws and regulations?
28. Are the adaptive management requirements in Special Condition S4 for level three responses reasonable and consistent with applicable laws and regulations?

1 29. Does the Department of Ecology have the authority as set forth in Special Condition
2 S5.A.1 to require a facility covered under the permit to respond to a direct public
3 request for a stormwater pollution prevention plan?

4 30. Are the effluent limitations for copper in a new source or a new discharger to a 303(d)
5 listed water body in Special Condition S2.C.2 consistent with RCW 90.48.555(3)?

6 31. Does the Department of Ecology have the authority to establish numeric effluent
7 limitations for copper for discharges to 303(d) listed water body segments where
8 there is no pollutant load allocation as required under 40 C.F.R. § 122.4(i)?

9 32. Are the benchmarks for copper discharges set forth in Special Condition S2
10 reasonable and consistent with applicable law?

11 33. Is the Permit's definition of "lake" appropriate and reasonable for determining what
12 benchmark is applicable to a specific boatyard?

13 NMTA has moved for summary judgment as to Issues 5, 6, 7, 8, 9, 17, 19, 26 and 32.

14 Soundkeeper moved for partial summary judgment on Issues 3, 4, 5, 6, 7, 8, 9, 17, 19, and 21.

15 Motions to dismiss issues 15, 22, 26, 29, 30 and 31 have been filed and agreed to. NMTA has
16 also moved for summary judgment on the additional issue of whether Soundkeeper has standing
17 to appeal. Ecology takes no position on Soundkeeper's standing.

18 ANALYSIS

19 Summary judgment is a procedure available to avoid unnecessary trials on formal issues
20 that cannot be factually supported and could not lead to, or result in, a favorable outcome to the
21 opposing party. *Jacobsen v. State*, 89 Wn.2d 104, 569 P.2d 1152 (1977). The summary
judgment procedure is designed to eliminate trial if only questions of law remain for resolution.
Summary judgment is appropriate when the only controversy involves the meaning of statutes,
and neither party contests the facts relevant to a legal determination. *Rainier Nat'l Bank v.*

1 *Security State Bank*, 59 Wn.App. 161, 164, 796 P.2d 443 (1990), review denied, 117 Wn.2d
2 1004 (1991).

3 The party moving for summary judgment must show there are no genuine issues of
4 material fact and the moving party is entitled to judgment as a matter of law. *Magula v. Benton*
5 *Franklin Title Co., Inc.*, 131 Wn.2d 171, 182; 930 P.2d 307 (1997). A material fact in a
6 summary judgment proceeding is one that will affect the outcome under the governing law.
7 *Eriks v. Denver*, 118 Wn.2d 451, 456, 824 P.2d 1207 (1992). In a summary judgment, all facts
8 and reasonable inferences must be construed in favor of the nonmoving party as they have been
9 in this case. *Jones v. Allstate Ins. Co.*, 146 Wn.2d 291, 300, 45 P.3d 1068 (2002).

10 1. Standing.

11 Although not a listed issue, NMTA now challenges Soundkeeper's standing to bring this
12 appeal. The Board has held that, to establish standing to bring an appeal, a petitioner must
13 demonstrate that: (1) the governmental action at issue causes a specific and perceptible injury-
14 in-fact that is immediate, concrete and specific; and (2) the interest the petitioner seeks to protect
15 falls within the zone of interest that the environmental statute is designed to protect. *Advocates*
16 *for Responsible Development v. Johannessen*, SHB No. 05-014 (2005). A petitioner bears the
17 burden of proof on the issue of standing. *Center for Environmental Law & Policy v. Ecology, et.*
18 *Al.*, PCHB No. 96-165 (1997). An organization that shows that one (or more) of its members is
19 specifically injured by a government action may represent those members in proceedings for
20 judicial review. *Save a Valuable Environment v. Bothell*, 89 Wn.2d 862, 867, 576 P.2d 401
21 (1978).

1 The Board finds that Soundkeeper is an organization whose stated purpose is protecting
2 water quality in and around Puget Sound. Its members use and enjoy the ecosystems affected by
3 stormwater discharges from facilities covered by the BGP. Soundkeeper's members engage in
4 various activities in close proximity to the facilities that will be covered by the BGP, and they
5 use the receiving waters where the permitted facilities discharge stormwater. *Puget Soundkeeper*
6 *Alliance's Response in Opposition to NMTA's Motion for Partial Summary Judgment*, p. 21-22,
7 *Decl. Joerger, Decl. Nichols*. The Board concludes that Soundkeeper therefore meets part (1) of
8 the test for standing because it has alleged a specific, concrete and perceptible injury to its
9 members and organizational interests.

10 Part (2) of the test for standing concerns the zone of interest that is protected by statute.
11 Washington's water pollution control statutes were enacted to "maintain the highest possible
12 standards to insure the purity of all waters of the state consistent with public health and public
13 enjoyment." RCW 90.48.010 These laws also were intended to insure "the propagation and
14 protection of wild life, birds, game, fish and other aquatic life, and the industrial development of
15 the state." *Id.* All of these interests relate to activities and concerns of members of Puget
16 Soundkeeper Alliance and the stated purpose of the organization itself. The Board concludes
17 that Soundkeeper and its members fall within the zone of interest that the environmental statutes
18 at issue in this case seek to protect. Therefore Part (2) of the test for Soundkeeper's standing is
19 satisfied. Because the Board concludes that Soundkeeper has standing in this case, the Board
20 does not address Soundkeeper's argument that it is not required by applicable statutes to show
21 that it has standing.

1 2. SWPPP Approval by Ecology.

2 In issue 19, Soundkeeper asserts that Ecology must require submission of stormwater
3 pollution prevention plans (SWPPPs) with applications for permit coverage for approval prior to
4 granting coverage to boatyard facilities under the BGP. In support of its contention that it is
5 illegal for Ecology to grant general permit coverage without prior approval of a facility's
6 SWPPP, Soundkeeper cites WAC 173-240-110(1). WAC Chapter 173-240 applies to the
7 submission of plans and reports in the context of construction of industrial wastewater facilities.
8 WAC 173-240-110(1) provides as follows:

9 Before constructing or modifying industrial wastewater facilities, engineering reports and
10 plans and specifications for the project must be submitted to and approved by the
department.

11 “Industrial wastewater facility” is a defined term. It means:

12 ...all structures, equipment, or processes required to collect, carry away, treat, reclaim or
13 dispose of industrial wastewater.

14 WAC 173-240-020(9).

15 Soundkeeper argues that, because the SWPPPs required by the BGP address the
16 engineering and administrative aspects of structures, equipment and processes to address
17 contaminated stormwater, SWPPPs are subject to the requirements in the regulations concerning
18 the construction of industrial wastewater facilities in WAC Chapter 173-240. The cited
19 provisions in WAC Chapter 173-240 do not require **boatyards** to submit SWPPPs to Ecology for
20 approval prior to obtaining coverage under a general permit. The Board finds no authority for
21 such a requirement in WAC Chapter 173-220, which contains the rules applicable to Ecology's

1 administration of Washington's National Pollutant Discharge Elimination System Permit
2 Program under which the BGP was issued. The Board has recently held that Ecology may
3 require the applicant for coverage under the Construction Stormwater General Permit to submit a
4 SWPPP for review prior to extending coverage under the General Permit. *Bloomquist, et al. v.*
5 *Ecology*, PCHB No. 03-121 (2004) (Order Granting Summary Judgment). This decision makes
6 it clear, however, that this is up to Ecology's exercise of discretion.

7 3. Applicability of RCW 90.48.555.

8 In the BGP, Ecology utilized benchmarks rather than numeric effluent limitations.
9 Soundkeeper asserts that RCW 90.48.555, which provides the standard for effluent limitations
10 for construction and industrial stormwater general permits applies to the BGP. Soundkeeper
11 argues also that RCW 90.48.555 requires Ecology to perform a reasonable potential analysis in
12 the development of the BGP. RCW 90.48.555 provides, in part, as follows:

13 The provisions of this section apply to the construction and industrial storm water general
14 permits issued by [Ecology] pursuant to the federal clean water act, 33 U.S.C. Sec. 1251 et
seq., and this chapter.

15 (1) Effluent limitations shall be included in construction and industrial storm water
16 general permits as required under the federal clean water act, 33 U.S.C. Sec. 1251 et
17 seq., and its implementing regulations. In accordance with federal clean water act
18 requirements, pollutant specific, water quality-based effluent limitations shall be
included in construction and industrial storm water general permits if there is a
reasonable potential to cause or contribute to an excursion of a state water quality
standard.

19 (2) Subject to the provisions of this section, both technology and water quality-based
20 effluent limitations may be expressed as:

- 21 (a) Numeric effluent limitations;
(b) Narrative effluent limitations; or

1 (c) A combination of numeric and narrative effluent discharge limitations.
2 RCW 90.48.555 (1) and (2).

3 Ecology argues that RCW 90.48.555 does not apply to the BGP, based on the statute's
4 clear language, its legislative history and, in particular, the statute's reference to 'the' construction
5 and industrial stormwater general permits issued by Ecology under the Clean Water Act.
6 Ecology argues that the precise identification of the two existing general permits, and the lack of
7 reference to other general permits such as the BGP and the Sand and Gravel General Permit,
8 indicates that the Legislature intended to limit the reach of RCW 90.48.555. In addition,
9 Ecology cites legislative history, which demonstrates an intentional change in the language prior
10 to the bill's passage that narrowed the application of the law from "stormwater general permits"
11 (SB6415) to "stormwater general permits for "the Industrial Stormwater General Permit and
12 Construction Stormwater General Permit" (SSB 6415).

13 The Board concludes that, as a matter of law, the requirements of RCW 90.48.555 do not
14 apply to the BGP. However, the proper and best standard or approach for evaluating effluent
15 limitations remains a central issue in this case, and the Board's ruling does not preclude the
16 possibility that the evidence may show that the approach used in RCW 90.48.555 regarding
17 water quality-based effluent limitations is an appropriate framework to apply to effluent
18 limitations in this BGP context.

19 4. Remaining Issues.

20 The other issues before the Board in this motion all concern whether the challenged BGP
21 provides adequate protection for waters affected by boatyard activities. Soundkeeper asks the

1 Board to grant summary judgment that the BGP is inadequate, arguing that NPDES General
2 Permit No. WAG-030000, the Boatyard General Permit (BGP) is unlawful because:

- 3 1. A reasonable potential analysis (RPA) must be done;
- 4 2. The BGP is inadequately conditioned;
- 5 3. The BGP's monitoring requirements are inadequate;
- 6 4. The BGP's conditioning fails to ensure that AKART (All Known, Available and
Reasonable Methods of Prevention, Control and Treatment) has been required as
applicable to wastewater discharges;
- 7 5. Permit modifications have inadequate procedural safeguards; and
- 8 6. Compliance certification is inadequate.

9 Soundkeeper asks the Board to remand the permit to Ecology for two purposes: (1) to
10 require it to use monitoring data or other means to determine whether boatyard stormwater
11 discharges have the reasonable potential to cause or contribute to violations of water quality
12 standards and; (2) to establish numeric effluent limitations. As authority for requiring a
13 'reasonable potential' analysis, Soundkeeper cites both EPA regulations and guidance (40 CFR
§122.44(d)(1)(i), as well as RCW 90.48.555.

14 NMTA moves the Board to grant summary judgment on issues 5, 6, 7, 8, 9, 17, 19, 26
15 and 32, asserting that the BGP requirements are more than sufficient safeguards to water quality.
16 NMTA argues that these requirements include strict compliance with water quality standards and
17 mandatory best management practices (BMPs) comprehensively eliminate the chance of release
18 of contaminants such as paint and paint residue from stormwater discharges. The BGP requires
19 water quality sampling and adaptive management conditions such as the submission of
20 engineering reports and treatment BMPs. If any samples exceed a benchmark value, the
21 permittee must prepare a source control report outlining treatment practices and structures.

1 NTMA asserts that, in this way, the BGP allows facilities to proceed in a reasonable manner in
2 accordance with each facility's individual needs.

3 Ecology argues that the plain language as well as legislative history does not support the
4 argument that RCW 90.48.555 should control the development or conditions of the BGP and that
5 Ecology must, instead, look to federal requirements and EPA guidance documents. The parties
6 present argument on the issue of whether Ecology may utilize benchmarks rather than numeric
7 standards for the limitation of effluents. Ecology argues that it is not required to use numeric
8 limitations-based standards and that it utilized appropriate limitations in its BGP. Ecology
9 characterizes the parties' disagreement about the applicability of benchmarks vs. numerically-
10 based effluent standards for monitoring as a factual disagreement between the parties. The
11 Board agrees. In the connection with their summary judgment motions, there continue to be
12 factual questions as to how the different approaches either do, or do not, adequately protect the
13 quality of receiving waters.

14 Having considered the briefs and materials submitted in connection with these motions
15 and also the arguments of the parties, the Board is convinced that Soundkeeper has standing to
16 bring this appeal, and NMTA's Motion for Summary Judgment on the issue of Soundkeeper's
17 standing should be denied. The requirements of RCW 90.48.555 do not apply to the BGP as a
18 matter of law. The Board is convinced also that Ecology's failure to require submission of
19 stormwater pollution prevention plans with applications for permit coverage was lawful, and
20 summary judgment as to Issue 19 should be granted to NMTA. Resolution of issues 3 through 9,
21 17, 21 and 32 requires further proof. They are not solely questions of law. Insufficient

1 uncontested material facts were submitted to the Board with the motions for it to grant summary
2 judgment on any of these issues. Therefore, the Board enters the following

3 **ORDER**

4 Based on the foregoing analysis, Respondent Northwest Marine Trade Association's
5 Motion for Partial Summary Judgment as to issues 5, 6, 7, 8, 9, 17, and 32 and as to standing is
6 **DENIED**. Appellant Puget Soundkeeper Alliance's (partial) Motion for Summary Judgment as
7 to Issues 3, 4, 5, 6, 7, 8, 9, 17, 21 and 32 are each **DENIED**. Summary judgment as to Issue 19
8 is **GRANTED** to Northwest Marine Trade Association and **DENIED** to Appellant Puget
9 Soundkeeper Alliance. Northwest Marine Trade Association's Motion to Dismiss Issues No. 26,
10 29, 30, and 31, and Puget Soundkeeper Alliance's Motion to Dismiss Issues No. 15 and 22 is
11 **GRANTED**, and Issues 15, 22, 26, 29, 30, and 31 are hereby **DISMISSED**. The remaining
12 issues as set forth in the Pre-Hearing Order are set over for hearing.

13 SO ORDERED this 7th day of July 2006.

14 **POLLUTION CONTROL HEARINGS BOARD**

15 WILLIAM H. LYNCH, Chair

16 KATHLEEN D. MIX, Member

17 ANDREA McNAMARA DOYLE, Member

18 Cassandra Noble, Presiding
19 Administrative Appeals Judge
20
21